

# EXHIBIT 210

Niemann, Robert

September 14, 2007

Baltimore, MD

Page 1

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

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IN RE: PHARMACEUTICAL : MDL NO. 1456

INDUSTRY AVERAGE WHOLESALE : CIVIL ACTION

PRICE LITIGATION : 01-CV-12257-PBS

THIS DOCUMENT RELATES TO :

U.S. ex rel. Ven-a-Care of : Judge Patti B. Saris

the Florida Keys, Inc. :

v. :

Abbott Laboratories, Inc., : Chief Magistrate

No. 06-CV-11337-PBS : Judge Marianne B.

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Bowler

Baltimore, Maryland

Friday, September 14, 2007

Videotaped Telephone Deposition of ROBERT NIEMANN

Henderson Legal Services  
202-220-4158

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Page 274	Page 276
<p>1 MR. COOK: Before moving on, I think we 2 wanted to put on the record that for both sides, an 3 objection for one is an objection for all. 4 MS. OBEREMBT: That sounds fine. 5 MR. HOVAN: That's great. 6 MS. OBEREMBT: The Three Musketeers 7 objection policy. 8 (Exhibit Abbott 314 was 9 marked for identification.) 10 BY MR. COOK: 11 Q. Mr. Niemann, I've handed you what we have 12 marked as Exhibit Abbott 314, which is a document 13 with no apparent date on the first page at least 14 entitled Medicare program payment for drugs with 15 titles, current policy proposal and average wholesale 16 price on the first page. It bears Bates numbers HHC 17 902-0001 through page 0016. Could you look through 18 that document and tell me if you recognize at all 19 what it is? 20 A. I don't remember the context of it, but it 21 looks like various, various ways to pay for drugs. 22 Q. Is this the sort of document that -- well,</p>	<p>1 A. Yes. I wouldn't have remembered the time 2 frame, but I remember the terminology. 3 Q. All right. The second paragraph on the 4 first page under proposal. Tell me if I'm right, but 5 I believe it reads, "we propose to eliminate the EAC 6 criterion and add two others, the actual acquisition 7 cost and the median AAC for the previous 12 months." 8 Is that correct? 9 A. Yes. 10 Q. Based upon your work in the agency, do you 11 have some idea who we might be? 12 A. Usually that was the agency, i.e. the 13 administrator, et al. 14 Q. Just from looking at this document and the 15 nature of the issues discussed in this document, do 16 you have some idea of who the target audience for the 17 document might have been? 18 A. I have a guess. I mean -- 19 Q. Who would that be? What would the guess 20 be? 21 MS. OBEREMBT: You can guess. 22 THE WITNESS: To me this reads like</p>
Page 275	Page 277
<p>1 let me ask you to flip through to Bates number page 2 0010 of the document. It's in the bottom right-hand 3 corner. And you see at the top, there is a date 4 December 6, 1995? 5 A. Uh-huh. 6 Q. Assuming that this document is dated in or 7 around December of 1995, that would be a time in 8 which you would be the policy analyst responsible for 9 the Medicare program payment for drugs, correct? 10 A. Yes. 11 Q. Is this the type of document or draft that 12 you would have prepared as the policy analyst on that 13 topic? 14 A. Yes. 15 Q. And looking through this, do you recall 16 preparing this document or a document such as this 17 one? 18 A. I actually don't. 19 Q. Does this document jog your memory about 20 some of the issues that you were considering in or 21 about December of '95 on the question of payment for 22 drugs?</p>	<p>1 something that would go in the Federal Register. The 2 target audience would be the public. 3 BY MR. COOK: 4 Q. And so this appears as if it might be a 5 draft of a notice of proposed rule making that never 6 made it into the Federal Register? 7 A. That's what it looks like to me. That 8 would be my guess. That's how it reads to me. 9 Q. Do you recall that in fact the agency was 10 considering promulgating a rule to go to actual 11 acquisition costs and eliminate the estimated 12 acquisition cost criteria? 13 MS. OBEREMBT: Object on the grounds of 14 deliberative process and instruct you not to answer. 15 BY MR. COOK: 16 Q. Mr. Niemann, would you agree with me that 17 this document itself reflects a consideration by the 18 agency of eliminating the EAC criterion and going to 19 an actual acquisition cost methodology? 20 MS. OBEREMBT: Objection. 21 THE WITNESS: But I should respond? 22 MS. OBEREMBT: Yes. You can answer. If</p>

70 (Pages 274 to 277)

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Baltimore, MD

<p style="text-align: right;">Page 278</p> <p>1 you know.</p> <p>2 THE WITNESS: I wish -- I'm actually</p> <p>3 embarrassed that I can't remember this better.</p> <p>4 That's unbelievable. My answer to your question</p> <p>5 would be predicated on my guess as to who we is. And</p> <p>6 that this actually was intended for the Federal</p> <p>7 Register. Then I'd have to agree -- I certainly</p> <p>8 agree that that's what this says. The question mark</p> <p>9 is whether this was far enough along that it was</p> <p>10 actually the agency considering doing this. I don't</p> <p>11 remember.</p> <p>12 BY MR. COOK:</p> <p>13 Q. And if you turn to the next page in the</p> <p>14 definitional section describing actual acquisition</p> <p>15 cost, AAC, the first sentence reads, "we propose to</p> <p>16 require suppliers to submit their actual acquisition</p> <p>17 costs for each drug when billing the program for the</p> <p>18 drug." Do I read that correctly?</p> <p>19 A. Yes, you do.</p> <p>20 Q. Would you agree with me that it was within</p> <p>21 the authority of HCFA to require suppliers to submit</p> <p>22 their actual acquisition costs when billing the</p>	<p style="text-align: right;">Page 280</p> <p>1 about burden, it might have had to do with burden.</p> <p>2 Q. And when you refer to burden, it would be</p> <p>3 the burden on the supplier?</p> <p>4 A. That's right. The reporting burden.</p> <p>5 Q. If you can look under the discussion on</p> <p>6 page --</p> <p>7 A. I just want to be clear.</p> <p>8 Q. Yes, sir. Please.</p> <p>9 A. I wasn't saying that I remembered that</p> <p>10 burden was the reason this didn't see the light of</p> <p>11 day. I don't. I'm responding to when you asked me</p> <p>12 about political pressure, what the nature of the</p> <p>13 pressure might be. And in my vague recollection,</p> <p>14 pressure would have been more likely in the arena of</p> <p>15 burden as far as getting people's attention. But I</p> <p>16 don't really remember why it was we didn't go forward</p> <p>17 with this.</p> <p>18 Q. On page 3 of this document, under the</p> <p>19 heading discussion. You agree with me that this</p> <p>20 discussion refers to data from 1995, and indicating</p> <p>21 an increase from 1992 to 1995 of Medicare allowed</p> <p>22 charges for drugs from 680 million to \$1.6 billion,</p>
<p style="text-align: right;">Page 279</p> <p>1 program for the drug?</p> <p>2 A. I just have a vague, gnawing -- if this</p> <p>3 had made it to the Federal Register, I would</p> <p>4 certainly agree because OGC would have signed off on</p> <p>5 it. But given the nature of it, and we are not sure</p> <p>6 how far along this got, I'm not certain what the</p> <p>7 problems were with that. I don't -- I don't</p> <p>8 remember.</p> <p>9 Q. Would you agree with me that one of the</p> <p>10 reasons why such a proposed rule might not make it</p> <p>11 into the Federal Register would be political backlash</p> <p>12 from providers who would see their reimbursement cut?</p> <p>13 A. That -- that certainly is reasonable that</p> <p>14 that would have come into play.</p> <p>15 Q. But you don't have a specific memory of</p> <p>16 whether or not that's the reason why this proposal</p> <p>17 never made it into the Federal Register?</p> <p>18 A. No. Not that.</p> <p>19 Q. Do you have a specific memory of why this</p> <p>20 proposal never made it into the Federal Register?</p> <p>21 A. It's vague. So once again, I'm not</p> <p>22 betting the farm on this, but I think complaints</p>	<p style="text-align: right;">Page 281</p> <p>1 correct?</p> <p>2 A. Yes.</p> <p>3 Q. The next sentence reads -- and tell me if</p> <p>4 I'm correct -- "there are numerous accounts of prices</p> <p>5 for drugs charged to the Medicare program in excess</p> <p>6 of the true marketplace, and the suppliers who bill</p> <p>7 Medicare receive discounts below the manufacturer's</p> <p>8 published average wholesale price." And then the</p> <p>9 next sentence reads, "in effect, the published</p> <p>10 average wholesale price is not the average price</p> <p>11 actually charged to wholesale customers." Did I read</p> <p>12 that accurately?</p> <p>13 A. Yes, you did.</p> <p>14 Q. And is that something that was likely</p> <p>15 written, if not by you, then by someone in a similar</p> <p>16 position to you?</p> <p>17 MS. OBEREMBT: Objection.</p> <p>18 THE WITNESS: I think I did write that.</p> <p>19 BY MR. COOK:</p> <p>20 Q. And so assuming that this document</p> <p>21 actually was dated approximately December of '95, if</p> <p>22 the date on the latter pages is an accurate</p>

71 (Pages 278 to 281)